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No. 90-1341

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF ENERGY,
Petitioner,

v.

STATE OF OHIO, et al.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

This case was brought in the district court and litigated in the Court of Appeals by the State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr. succeeded by Lee Fisher. The Defendants-Appellants before the Court of Appeals were the U.S. Department of Energy and Secretary of Energy James D. Watkins.

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STATUTORY PROVISIONS INVOLVED

The State concurs with the statement of statutory provisions provided by the Department of Energy Petition, with one exception. Because there are minor errors in the text of 42 U.S.C. 6972 as set forth in the Appendix to the DOE Petition, the State has printed the text of that statutory section in the Appendix attached hereto.

STATEMENT OF THE CASE

In March of 1986, the State of Ohio filed suit against the U.S. Department of Energy ("DOE") for widespread and longstanding violations of the state and federal pollution laws. For several years, DOE had been engaged, and was continuing to engage itself, in illegal acts which flaunted both the hazardous waste and water pollution laws. These illegal activities took place at DOE's Feed Materials Production Center (FMPC), also commonly known as the Fernald facility, located near Cincinnati.

I. DOE's Lengthy Record Of Noncompliance With The Hazardous Waste Laws Illustrates Congress' Reasons For Subjecting Federal Facilities To Civil Penalties For Violations Of The Hazardous Waste Laws.

The Complaint describes thirteen types of hazardous waste safety standards which DOE has violated at the FMPC. Counts Three - Fifteen. DOE illegally dumped hazardous waste into a waste pit, allowed hazardous waste to leak from an illegal drum storage site, and carried on other illegal hazardous waste activities. Count Three and Paragraphs 18-23.

Although all hazardous waste facilities have been required since 1981 to install adequate monitor wells to detect hazardous waste constituents leaking into the groundwater, the Complaint recounts that DOE had not yet complied with this standard five years later. Count Seven. Contamination is believed to be coming from the illegal hazardous waste

disposal pit. Count Five.

To compound the fact that treatment, storage, and disposal of hazardous waste at the FMPC was illegal, DOE did not bother to manage the hazardous waste with even a modicum of safety. While the rules required hazardous waste facilities to be regularly inspected for health hazards, DOE for 3 ½ years failed to do so. Count Ten. While the rules required aisle space between drums of waste so that operators could see leakage and other problems, and so that spill and fire fighting equipment could be moved around the drums, DOE disregarded this requirement. Count Eleven. While the rules required an emergency contingency plan to inform workers how to safely respond to fires, explosions, and releases of hazardous waste, DOE ignored this precaution for 3 ½ years. Count Twelve. DOE failed to teach its workers how to safely handle hazardous waste (Count Fourteen), to write a proper closure plan (Count Eight), or to analyze its waste so it would know how to safely manage it (Count Fifteen). In short, DOE widely disregarded the rules of both the hazardous waste authorities and common sense.

II. DOE's Disregard Of Its State And Federal Water Pollution Obligations Has Been Longstanding And Continuous.

By the time the Compiaint was filed, DOE had subjected the Great Miami River and Paddy's Run to illegal concentrations of hexavalent chromium, total chromium, copper, iron, ammonia, suspended solids, and oil and grease for two and one-half years. Count Seventeen. Excessive contaminants were discharged into the Great Miami for years as a result of DOE's disdain for the schedule in its permit requiring the construction and operation of new pollution abatement equipment by June 30, 1984. Counts Eighteen through Twenty-Three. This pollution continued even after the lawsuit was filed. Because DOE had fallen so far behind on equipment installation, the consent decree now enjoins compliance by 1990, six years late. Consent Decree, Para. 4.4, 4.5.

III. The State Requested Civil Penalties In Order To Deter DOE From Violating Both State And Federal Law.

The State realized that injunctive relief alone would not provide DOE with the motivation necessary to persuade the Department to obey the law in the future. An injunction alone would have done little more than require DOE to stop its illegal activities, and then only after protracted litigation, rather than punishing DOE for violating the law. The State realized that DOE would have little incentive to voluntarily comply with the law in the future unless the Department realized it could be penalized for violating the law.

To encourage not only DOE, but other federal agencies as well, to voluntarily comply with the law, the State requested civil penalties to address DOE's irresponsible behavior at the Fernald plant. Because both federal and state laws were being violated, the State utilized the penalty provisions of both state and federal statutes. As a result, the State presented civil penalty causes of action to the district court pursuant to the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. 6972(a)) and pendent state law, (O.R.C. 3734.13(C)) for hazardous waste violations and the citizen suit provision of the Clean Water Act (33 U.S.C. 1365(a)) and pendent state law (O.R.C. 6111.09) for water pollution violations.

DOE responded by attempting to exempt itself from civil penalties by invoking the age-old doctrine of sovereign immunity. The district court rejected all of DOE's contentions, finding in the language and legislative history of RCRA and the Clean Water Act a clear Congressional intent to waive immunity from both federal and state hazardous waste and water pollution civil penalties. The court of appeals affirmed. While the appellate court erroneously found no waiver for state hazardous waste penalties (see the State's Cross-Petition), the court did find a waiver for federal hazardous waste penalties and state water pollution penalties.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' Rulings In Favor of the State Followed The Rules Of Statutory Construction Applicable To Waivers Of Sovereign Immunity By Respecting The Intent Of Congress, Rather Than Inventing Strained, Improbable Meanings For The Terms Used In The Statutes.

When interpreting a waiver of sovereign immunity, the responsibility of the courts is to ascertain congressional intent and to effectuate it. *Philbrook v. Glodgett*, 421 U.S. 658, 713 (1975). The courts are not to adopt a "crabbed construction" to restrict a waiver or to insist that Congress use "a ritualistic formula" to waive immunity. *Franchise Tax Bd. of Cal. v. U.S. Postal Service*, 467 U.S. 512, 521 (1984). Instead, the scope of a waiver can be ascertained only by reference to "underlying congressional policy." *Id.*

When determining the meaning of a waiver, the courts assume that legislative intent is expressed by the ordinary meaning of the words used in the statute. *Kosak v. United States*, 465 U.S. 848, 853 (1984); *United States v. Yellow Cab Co.*, 340 U.S. 543, 548 (1951). This Court has consistently declined to depart from the plain meaning of statutory language absent clear indication of contrary legislative intent. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Where the language of a statute broadly waives sovereign immunity, the courts may not whittle it down by resorting to a review of legislative history or other refinements. *Yellow Cab*, 340 U.S. at 549-50.

In its Petition, DOE invites the Court to formulate a new rule of statutory construction for this case, a standard so strict that no waiver could withstand scrutiny. DOE demands that a rule of "narrow construction" be used to interpret waivers, thus insisting that the Court go out of its way to find a meaning that would defeat waivers otherwise clear on their face. DOE Pet., p. 16.

However, the Court has never held Congress to such an

impossible standard. Not a single decision from the Court has ruled that a waiver must be so clear that it admits of no other possible interpretation. Instead, the courts must determine whether or not the waiver "can fairly be interpreted" as creating government liability. *United States v. Testan*, 424 U.S. 392, 400 (1976). When authority to file suit is given, this consent is liberally construed. *Yellow Cab*, 340 U.S. at 555.

Where Congress has provided a broad waiver of immunity, the scope of the waiver must not be narrowly limited by a court's construction of its terms. *Canadian Aviator v. United States*, 324 U.S. 215 (1945). Congressional intent is not to be "thwarted by an unduly restrictive interpretation." *Id.*

In its decision, the court of appeals correctly noted that it had to avoid the temptation to seek any hint of ambiguity that might be used to twist the statute into denying an intended waiver. App. to DOE Pet., p. 3a. Once the intent of the legislative branch has been ascertained, that intent should be respected rather than undercut by aggressively contriving some other possible interpretation. Except where the court of appeals went out of its way to look for another "plausible" interpretation to defeat Congress' intended waiver for state hazardous waste penalties (see the State's Cross-Petition), the court of appeals honored Congressional intent by construing the waivers according to their language and legislative history. This Court should turn back DOE's invitation to formulate a new "narrow construction" rule of statutory construction for waivers. This invitation is contrary to all of the decisions on sovereign immunity and would only serve to harm the public Congress intended to protect by enacting the waivers.

II. Because Penalties Are Necessary To Convince Federal Polluters To Comply With The Law, Penalties Are An Essential Component Of Comprehensive Congressional Programs To Reduce And Eliminate Pollution.

The courts have long recognized that civil penalties are

an effective mechanism to enforce the law. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *Oceanic Steam Navigation Co. v. Stranaham*, 214 U.S. 320 (1908). A civil penalty will deter the violator from violating the law again. *ITT*, 420 U.S. at 231-32.

Accordingly, the legislative history of the Clean Water Act shows that Congress regarded civil penalties and other sanctions as an indispensable component of its comprehensive water pollution abatement program. In fact, Congress attributed the failure of its pre-1972 water pollution laws in part to the lack of sanctions imposed for noncompliance with them. S. Rep. No. 414, 92d Cong., 2d Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3730-31.

As a result of this need for enforcement, Congress has generally provided for both criminal and civil penalties to enforce its environmental statutes, including the Clean Water Act and RCRA. Furthermore, where a state is given the authority to administer the federal pollution control program under either of these statutes in lieu of the federal government, it is a *mandatory* prerequisite of federal law that these states first enact criminal and civil penalty provisions to enforce these programs.

If violators cannot be penalized for past misconduct, they will have little incentive to comply with the law until a court orders them to comply. In effect, until a lawsuit is filed against him, a violator has a "free" period of noncompliance during which he can violate the law with impunity. Only if faced with penalties for noncompliance will many polluters comply without forcing the government to sue them. This sorry reality was Congress' motivation for insisting that penalties be used to encourage voluntary compliance.

While investigating pollution practices, Congress found that federal agencies were not doing their share to control pollution. For example, during its consideration of the 1972 water pollution law, Congress was alarmed to find "many incidents of flagrant violations" of air and water pollution

laws by federal facilities. S. Rep. No. 414, 92d Cong., 2d Sess. 67, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3733-34. Part III of the State's Cross-Petition describes in more detail the widespread defiance by federal agencies to the pollution control laws and their resort to litigation to fight state efforts to reduce their pollution.

Due to its dissatisfaction with the noncompliance record of federal facilities, Congress included 33 U.S.C. 1323 in the 1972 amendments to the Clean Water Act. S. Rep. No. 414 at 67-68, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 3733-34. 33 U.S.C. 1323 waived immunity for state water pollution laws as well as federal laws. Such a waiver for state law was essential, since the act gave the states the primary role in abating water pollution and limited U.S. EPA to a supervisory role. 33 U.S.C. 1251(b). Federal facilities, then, could no longer ignore their water pollution control obligations under either state or federal law.

However, while considering the Clean Water Act Amendments of 1977, Congress found that federal agencies were continuing to ignore federal, state, and local water pollution laws despite the 1972 waiver in 33 U.S.C. 1323. Furthermore, these agencies were obtaining court decisions exempting them from various water pollution requirements under the guise of sovereign immunity.

As a result, Congress amended 33 U.S.C. 1323 to expressly authorize sanctions against federal facilities to give them incentive to comply. S. Rep. No. 370, 95th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Ad. News 4392. In the meantime, Congress had also enacted RCRA in 1976. Upon hearing of continuing widespread federal disregard for the previously enacted water and air laws, Congress in RCRA also expressly waived all immunity from enforcement of state and federal hazardous waste laws.

Unfortunately, even the explicit waivers in 1976 and 1977 did little to encourage federal agencies to comply. Confident in their ability to obtain deferential immunity decisions from the courts, federal agencies continued their old pollution

practices even as private industry was shouldering its share of pollution control. Because federal agencies have believed they can convince the courts to read civil penalties out of the waivers, they have had little incentive to obey the law.

DOE, in an attempt to convince the Court that it should be immune from the deterrent effect of civil penalties, encourages the Court to accept its petition and to read holes into the Clean Water Act and RCRA civil penalty provisions through which it may slip. As the State will explain below, acceptance of DOE's invitation would do more than let DOE escape responsibility for its disgraceful conduct - it would also repudiate the language of these statutes and defeat Congress' intent to comprehensively stop pollution by federal agencies. The Court should not encourage further DOE misbehavior by granting its petition.

III. Rather Than Being An Unusual Step, Congress' Imposition Of Penalties On Federal Agencies Is Not Only A Logical, But An Essential, Part Of Congress' Plan To Stop Federal Facility Pollution By Deterring Illegal Conduct.

The federal executive branch has been waging a nationwide campaign to have the civil penalty provisions of both federal and state environmental statutes declared inapplicable to federal facilities. Obviously, if federal facilities were not highly disturbed at the prospect of being penalized for their violations, they would not be spending so much effort to avoid liability. The alarm shown by DOE and other federal agencies demonstrates that civil penalties will be an effective, indeed, the only effective way, to finally coerce responsibility from them.

A penalized federal agency must pay the penalty from either the federal government's Judgment Fund or the money appropriated to that agency. In the case of the latter, the agency loses use of the money regardless of whether the

money is paid to the state or to another account in the U.S. Treasury.

However, the prospect of being penalized for violating the law has an importance to federal facilities which goes beyond merely losing the money they are ordered to pay. The assessment of a civil penalty is a public declaration that the defendant agency has violated the law. Payment of such a penalty will focus attention on the wayward agency by the executive branch and Congress, which will hopefully make inquiries into the agency's wrongdoings and take steps to prevent the recurrence of these wrongdoings. The publicity generated by this undesired attention will convince other federal agencies to straighten up.

In its Petition, DOE argues that this Court should hear this case because Congress could not have intended to have federal agencies pay civil penalties into the United States Treasury pursuant to a citizen suit. However, the agency's loss of money from its account and the extra public scrutiny demonstrates that an agency has real incentive to comply if penalties can be assessed. Because Congress was well aware that penalties would be an effective means to finally capture the attention of recalcitrant federal agencies, Congress' waiver of immunity should be interpreted in light of that knowledge. In light of federal agencies' stubborn refusal to comply with Congress' laws, it was not unusual to see Congress resort to penalties to finally force them to obey the law. Therefore, the Court should not grant DOE's Petition just because DOE asserts that Congress could not have intended to penalize federal agencies.

IV. Because The States Have Exercised Restraint In Pursuing Civil Penalties Against Federal Agencies, DOE's Accusation About State Raids On The Federal Treasury Is Unwarranted.

As it has done previously during this litigation, DOE raises the spectre of state raids on the federal treasury in hopes of convincing the Court that Congress could not have meant

to penalize federal agencies for their illegal behavior. DOE insultingly characterizes state enforcement as a fundraising gimic rather than as a necessary remedy for federal misbehavior. DOE Pet., pp. 16-17. This ploy has been successful in the Ninth and Tenth Circuits, where the courts have accepted the executive branch's invitation to ignore clearly expressed Congressional intent. By including this wild allegation in its Petition, DOE seeks to convince the Court that review is necessary to save the federal treasury.

Contrary to DOE's scenario, the states undertake enforcement against a federal agency only where no other alternative will be effective. States have much easier methods for obtaining revenue than undergoing intense, draining litigation against uncooperative federal agencies.

In fact, this is the first civil penalty waiver case to reach the petition stage under either RCRA or the Clean Water Act even though the relevant waivers were enacted in 1976 and 1977. That only one such case has reached the Court in fourteen (14) years is testimony to the restraint exercised by states in these matters.

The states' restraint in penalizing federal agencies is also demonstrated by their enforcement of the air pollution laws. Even the 1979 Comptroller General opinion cited in footnote 21 of DOE's Petition acknowledges that the Clean Air Act waives federal immunity for air pollution civil penalties. Despite the existence of this clear waiver since 1977, the State is aware of only three cases in which states have pursued the penalties option for federal air pollution violations. *State of Alabama v. Veterans Administration*, 648 F.Supp. 1208 (M.D. Ala. 1986); *State of Ohio v. Air Force*, 17 Env'tl L. Rep. (BNA) 21210 (S.D. Ohio 1987) (appeal voluntarily dismissed); *U.S. v. Air Pollution Control Board of Tenn.*, unreported case no. 3:88-1030 (M.D. Tenn. March 2, 1990) (appeal voluntarily dismissed). Since all three states were successful in overcoming sovereign immunity defenses in those cases, the paucity of state air pollution penalty cases against federal agencies during the past fourteen years shows that DOE's inflammatory treasury raid scenario does

not occur even where the federal government has admitted that the states can obtain penalties.

Therefore, preservation of the federal treasury is not a factor which should dictate the granting of DOE's petition. DOE's Petition should be denied.

V. The Court of Appeals Below Correctly Held That Both The Language And Legislative History Of The RCRA Citizen Suit Provision Express Congressional Intent To Penalize Federal Agencies For Illegal Hazardous Waste Conduct. No Court of Appeals Has Construed This Provision To The Contrary.

The court below accurately acknowledged the obvious Congressional intent to waive sovereign immunity for federal hazardous waste penalties. In fact, the legislative history of the RCRA citizen suit provision expressly and unambiguously explains that federal agencies are subject to civil penalties:

> Either a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and *penalty provisions of section 7002.* [42 U.S.C. 6972]. To assure that there is no confusion as to this, the amendments to section 7002 continue to use the current statutory language to specifically authorize a suit against "any person, *including the United States* . . ."

S. Rep. No. 284, 98th Cong., 1st Sess. 44 (1983). (emphasis added). Congressional intent to subject federal facilities to civil penalties in citizen suits cannot be expressed more clearly.

The language of the citizen suit provision is equally clear. This provision explicitly authorizes lawsuits "against any person, (including (a) the United States)".

The above-quoted Senate report language shows that, when Congress expanded the citizen suit provision to add

assessment of civil penalties, it was well aware that the definition of "person" in that provision included the United States. Defining the United States as a "person" in the same section containing the citizen suit penalty authorization was meant to "assure that there is no confusion" about the courts' ability to penalize the United States. That this was the intent of the entire Congress became evident when the conference committee adopted the Senate's version of 42 U.S.C. 6972(a) word-for-word, saying, "The conference substitute adopts the Senate amendment . . ." (with additions to other subsections of the citizen suit provision not related to the issue at hand). Conf. Rep. No. 1133, 98th Cong., 2d Sess. 117 (1984), *reprinted in* 1984 U.S. Code Cong., & Ad. News. 5688-89. Congress then passed the same language, with "person" being defined to include the United States.

Because the citizen suit provision itself defines the term "person" to mean the United States, there is no need to have a second definition in another portion of the statute. Therefore, DOE's argument that the general definition section of the act also had to define "person" to include the United States is without merit. As the court of appeals below aptly noted, the citizen suit provision incorporates by reference the penalty provisions of Sections 3008, not vice versa. Therefore, the definition of "person" within the citizen suit provision is the applicable one. The above-quoted language from the Senate report also makes this clear by declaring that the definition of "person" in the citizen suit provision continues to include the United States to "assure that there is no confusion" about Congressional intent to penalize federal agencies for illegal conduct.

Because no other court of appeals has ruled on this issue, the Sixth Circuit's opinion cannot possibly conflict with a decision of another circuit. In fact, when the Court of Appeals for the Ninth Circuit originally wrote its opinion in *U.S. v. Washington,* 872 F.2d 874 (1989), that court had the following to say about the citizen suit waiver:

> The express waiver of sovereign immunity regarding civil actions filed by a citizen contained

> in section 6972(a)(1)(A) demonstrates unequivocally that Congress knows how to waive immunity from civil penalties when it wants to.

Slip opinion, pg. 3649 (Attachment F to the State's Court of Appeals Brief). Although interested *amici* states and the Department of Justice had fully briefed this issue in *Washington*, the Ninth Circuit later replaced these words with noncommittal language after Justice moved for reconsideration on the grounds that this issue was not before the court. Notwithstanding Justice's protests and the Ninth Circuit's obliging response, the original language shows that a frank examination of this "express waiver of sovereign immunity" discloses Congressional intent to have civil penalties assessed against federal facilities.

The only other court known by the State to have construed this penalty section with regard to federal agencies was a district court in *MESS v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986). The *MESS* court sought to impose its own drafting preferences on Congress by refusing to respect Congressional intent simply because the definition of "person" does not appear in the general definitions section. The main excuse for disregarding Congressional intent appears to be the *MESS* court's surprise that the states would be allowed to penalize a federal agency when the statute did not authorize U.S. EPA to do it. However, the statute does not authorize U.S. EPA to penalize other federal agencies simply because the U.S. Department of Justice prohibits sister federal agencies from suing each other.

Contrary to this Court's admonition to respect Congressional intent, the *MESS* court went out of its way in an attempt to find an ambiguity to defeat Congressional intent to waive. The excuse used by the *MESS* court to disregard Congressional intent thus should give way to the well-reasoned decision on this issue by the court of appeals below.

DOE's petition blasts the court of appeals for its "bald assertion" that application of penalties to the United States

is the "fairest reading" of the citizen suit provision. Pet. at 28. Yet this Court has previously used an almost identical phrase when it mandated the federal courts to determine whether a statute "can fairly be interpreted" as creating government liability. *Testan*, 424 U.S. at 400. Moreover, penalty authorization against federal agencies under this provision is not just its "fairest" reading. It is the only interpretation possible without ignoring the words and intent of Congress.

Combining the explicit language of 42 U.S.C. 6972, defining the United States as a "person" subject to penalties, with the statement of legislative history that "a noncomplying agency . . . [is] subject to the citizen suit and penalty provisions of section 7002," there can be no doubt about Congressional intent. Added to this is Congress' intent to treat federal facilities just like private citizens in order to protect the effectiveness of the comprehensive hazardous waste program. S. Rep. No. 988, 94th Cong., 2d Sess. 23-24 (1976). Given the clarity of Congressional intent and a lack of conflicting caselaw from other courts of appeals, this Court should decline to hear this matter. Rather than accepting DOE's invitation to innovatively add ambiguity to the statute, the Court should reject DOE's attempt to prolong its escape from liability for its wrongdoings.

VI. The Court Of Appeals Below Correctly Held That Ohio's Civil Penalties Arise Under Federal Law, Since Ohio's Water Pollution Prevention Program and Penalties Originated From The Clean Water Act.

A. Contrary To DOE's Contention, It Is Well-Settled That The Term "Sanctions" Includes Civil Penalties.

The Clean Water Act waiver provides that federal agencies are subject "to any process and sanction, whether enforced in federal, state or local courts or in any other manner." 33 U.S.C. 1323(a). Therefore, federal agencies and officers are subject to civil penalties if civil penalties are a form of sanction

in the plain and ordinary usage of that word. *Kosak*, 465 U.S. at 853. In order to ascertain the plain and ordinary meaning of a word, the courts frequently rely upon the use of dictionary definitions. *Cf, Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 fn. 20 (1976).

Black's Law Dictionary defines "sanction" as:

> . . . The part of a law which is designed to secure enforcement *by imposing a penalty for its violation*
> . . . .

(Emphasis added.) Black's Law Dictionary 1203 (Rev. 5th Ed. 1979). The court of appeals below cited a similar definition from another dictionary. *See* also, the language of this Court in *United States v. Ward*, 448 U.S. 242, 249 (1980) (". . .Congress labelled the sanction authorized in 311(b)(6) [of the Clean Water Act] a 'civil penalty'. . ."). Thus, it is very clear that the common usage of the word "sanction" is a description of the penalty that is imposed on someone who has violated the law. Obviously, civil penalties fit within that description.

Significantly, the last sentence of 33 U.S.C. 1323 specifically exempts federal *officers* from civil penalties for official duties, an exemption which would be unnecessary if the previous language of the section had not generally waived liability for civil penalties. DOE's protestation to the contrary, the Court should not encumber its schedule to review such a settled question.

B. Because The Court Below Correctly Found That Federally Mandated And Approved Penalties Arise Under Federal Law, And Because The Ninth Circuit Decision Did Not Address This Issue In The Context Of Sovereign Immunity, Review Of This Question By This Court Is Not Merited At This Time.

Another clause in 33 U.S.C. 1323 provides that federal agencies are liable "only for those civil penalties arising

under Federal law. . . ." "Arising under" Federal law is not the same as *being* a Federal law. The word "arise" means to "originate" or "come into being." *Webster's New World Dictionary*, 2d Ed. There can be no doubt that Ohio's penalties originate under or have come into being under federal law.

In 33 U.S.C. 1342(b), Congress authorized the states to implement the Clean Water Act by administering the federal water pollution program. The Clean Water Act specifically requires the state to abate violations through the use of civil penalties and other means of enforcement. 33 U.S.C. 1342(b)(7). The Act provides that the state permit program shall be implemented "in accordance with" 33 U.S.C. 1342. 33 U.S.C. 1342(c)(2). The state then assumes responsibility for implementing the Section 402 permit program *on behalf of and in lieu of U.S. EPA*. 33 U.S.C. 1342(c)(1). Compliance with the state permit constitutes compliance with the Clean Water Act. 33 U.S.C. 1342(k). As the court of appeals aptly noted below, compliance with federally approved state law *is* compliance with the Clean Water Act. App. to DOE Pet., p. 7a. Therefore, the entire permit program, including its civil penalty provisions, originates or arises from federal law.

Approved state programs thus *replace* federal implementation of the Clean Water Act. Adding to the federal character of the permits issued by states under approved programs is the fact that U.S. EPA can directly enforce the permits *as federal requirements*. 33 U.S.C. 1319(a).

As the court below noted, the introductory section of the Clean Water Act makes it clear that state permit programs arise *under* federal law by declaring:

> It is the policy of Congress that the States . . . implement the permit programs *under* sections 402 and 404 of this Act.

33 U.S.C. 1251(b) (emphasis added). In several other sections, Congress refers to a "permit issued *under* Section 402 of this Act . . . by a State" (emphasis added) or uses similar language. 33 U.S.C. 1319(a); 33 U.S.C. 1319(c); 33 U.S.C.

1319(d); 33 U.S.C. 1311(i). The legislative history of the Act repeatedly uses the same language. Obviously, Congress regarded state permit programs as arising *under* federal law (the Clean Water Act).

Ohio's approved water pollution program and penalties were created for the specific purpose of implementing the Clean Water Act. O.R.C. 6111.03. In fact, O.R.C. Chapter 6111 contains no fewer than 33 references to the Clean Water Act in the course of implementing the Act. The penalties specified in O.R.C. 6111.09 are not only authorized, but *mandated*, by federal law. 33 U.S.C. 1342(b)(7).

DOE's Petition postulates that federal approval of Ohio's permit program and penalties does not convert Ohio's penalties into federal law. However, neither the State nor the decision below have argued that O.R.C. 6111.09 has been *converted* into a federal law. Instead, O.R.C. 6111.09 penalties have arisen under, i.e., *originated or come into being under*, federal law. See the dictionary definition of "arise" provided above. Similarly, the legislative history citations provided in DOE's Petition simply mention that penalties are still implemented as state law rather than being converted into federal law. These citations do not contradict the State's position that the penalties originate under federal law.

The Ninth Circuit decision in *California v. Dep't of the Navy*, 845 F.2d 222 (9th Cir. 1988), also fails to reach the conclusion sought by DOE. In that case, California had attempted to enforce state penalties, not by asserting a cause of action pursuant to its state civil penalty provision, but by suing directly pursuant to 33 U.S.C. 1319 and 1342(b)(7). The Ninth Circuit ruled that these sections provided jurisdiction only for U.S. EPA lawsuits and that these sections did not turn into state law upon U.S. EPA approval of the state water pollution program. Although the Ninth Circuit did write some unfortunate language about the meaning of "arise under," its opinion makes it clear that the court was not reaching a sovereign immunity question, by declaring:

> Having determined that the § 309 does not provide an independent jurisdictional ground for the State's

> suit, we need not decide whether the language of §§ 309(d) and 313 contains the requisite explicit waiver of sovereign immunity to allow an action against the Navy.

Id., at 225, fn. 3. This case thus fails to provide the direct conflict in circuit decisions postulated by DOE to necessitate this court's review.

By arguing that Ohio's federally created, federally approved substitutive water pollution program does not "arise under federal law," DOE disregards completely the plain meaning of the phrase and makes its existence in the statute entirely meaningless. In light of the well-reasoned nature of the court of appeals' opinion below on this issue, and the lack of direct conflict with any other circuit, the Court should decline to grant DOE's Petition.

CONCLUSION

The U.S. Department of Energy's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Section 7002(a) of RCRA, 42 U.S.C. 6972(a), provides:

> (a) In general. Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
>
> (1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act; or
>
> (B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy

or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g).